IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1394 of 1993

with

CRIMINAL APPEAL No 124 of 1994

with

Criminal Appeal No.125 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAJAN JOHNSONBHAI CHRISTY

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1394 of 1993

MR KJ SHETHNA for the appellant

Mr.Y.F.Mehta for Respondent No. 1

2. Criminal AppealNo 124 of 1994

MR Y.F.Mehta, APP for the appellant State

Respondent served.

3. Criminal Appeal No.125 of 1994

Mr.Y.F.Mehta, LAPP for the State-appellant

Mr.K.J.Shethna, L.A. for the respondent

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE
Date of decision: 17/01/97

C.A.V. JUDGEMENT (Per N.J.Pandya,J.)

In all three persons were facing trial by way of Sessions Case No.336 of 1992 of the Court of City Sessions Judge, Ahmedabad essentially for offence under Sec.302 of Indian Penal Code. The charge that came to be framed refers to also Sections 120-B and 34 of Indian Penal Code. The charge at Exh.2 has been framed very carefully and individually, all of them came to be charged for offence under Sec.302 and collectively read with Sec.120-B and/or Sec.34 of Indian Penal Code.

2. The incident leading to the said trial occurred on 20th May 1992 at about 1.00 p.m. in staff quarter no.7 of Mental Hospital Compound, situated behind H.B.Kapadia High School, Outside Delhi Darwaja, Ahmedabad. Son Chetan @ Pappu of Mrs.Ilvina was done to death in a very brutal manner. As per the prosecution case, hands of the deceased were tied at his back with a rope or a string, his mouth was goggled and with a sharp cutting as well as blunt instrument injuries on his body were caused and his genital organ was cut and placed by the side. The deceased was left in this manner in a pool of blood, ofcourse, lifeless.

3. Of the three accused, two accused came to be acquitted by the learned Additional Sessions Judge by his judgment dated 25-10-1993. The convicted accused, original accused no.1, has filed appeal No.1394 of 1993, the State has filed appeal No.124 of 1994 praying for enhancement of sentence which would mean that instead of life imprisonment which has been awarded by the learned trial Judge, he should be awarded capital punishment and another appeal No.125 of 1994 is filed in respect of acquitted original accusedno.2-Domnic @ Bablo @ Bablo Bachubhai. The name of the convict-appellant is Rajan Johnsanbhai Christy. The 2nd acquitted accused is Mohmad

Rafik Mohamad Ramjan Patan. As State has chosen not to file an appeal against his acquittal, it becomes final.

4. The deceased was the Son of said Ilvina by her previous marriage. Sometime after the death of her first husband, she came in contact with the present accused-appellant and got married. The case of the prosecution is that for about 3 to 4 years, they were quite happy with each other. Gradually, on account of deceased Son Chetan, difference developed between the two, and she was led to divorce by accused no.1-appellant. Again, compromise was arrived at and they had started living together as husband and wife. According to the prosecution, the resentment on the part of the accused-appellant against the deceased continued and ultimately culminated into the heinous crime. The deceased, at the time of the death, was hardly aged about 12 years.

5. The prosecution has been relying on circumstantial evidence mainly. To an extent, it can also claim to have eye witnesses, but they have not witnessed the act itself. What they do for the prosecution is that they bring accused no.1-appellant at the scene of offence at about the time when the incident occurred. The prosecution had also relied on lie detector test, which is technically, known as polygraph test. The prosecution further relied on the confessional statement said to have been written down by accused no.1-appellant, in his own handwriting (Exh.71). This he is said to have done on 30th May 1992.

6. In order to show that accused no.1-appellant was attached to the deceased and was virtually treating him to be his Son, questions have been put to the concerned witnesses in cross-examination and material has also been produced in that regard. Material is to the effect that accused no.1 appellant who was serving, at the time of the incident in Police Department as Peon, had nominated the deceased for his gratuity, provident fund etc. There are other indications also in this regard. Accused no.1-appellant had entered defence by examining witnesses. He tried to show that he, in fact, was on duty at the Police Department and therefore, had nothing to do with the incident. In other words, he has tried to put a defence of alibi. On the date of the incident, right upto the time that the report came to be filed at 1.14 p.m. at the instance of accused no.1-appellant himself for certain happenings there is no controversy between the prosecution and the defence. That was the last day of the training that Mr.Ilvina underwent at

Paldi. At about 9 o' clock, accused-appellant left with Mrs. Ilvina on a scooter to drop her at the training centre, which he did by 9.30 AM. Thereafter, he proceeded to his office, which again, he left by about 11.45 AM with posts to be delivered in different Courts in the City. His Office is situated near the Metropolitan Court of Ahmedabad. After going to the Metropolitan Court, he was supposed to go to another Court as well as the Court at Mirzapur(Ahmedabad Rural) and after completing that round, as per his own say, he came to his house, at 1.00 p.m. He went there for his afternoon meal and in that he wanted his Son to join and while calling him for the purpose, he entered the house through a door, which he found open. There, he saw the deceased lying in a pool of blood. He also saw a knife like instrument left onthe dead body. He further say genetals of the deceased having been cut and left lying near the dead body. In the state of shock, he came out crying and after recovering from the shock, he informed the police for which there is an entry recorded in Madhavpura Police Station at 1.14 p.m.

7. We have noted the version of the accused about, how he spent time from 9.00 AM to 1.00 PM. It is significant to note, however, that he has been able to produce evidence only with regard to his movement upto 11.45 A.M. The defence witness supports him fully till then. Thereafter, as to the actual delivery of posts at 3 different offices and return of the delivery book, there is no material on record indicating that it was the accused, who did everything. On the contrary, it has come on record of the cross-examination of said defence witness Vakhatsingh Ratansingh,Exh.82, that the delivery book was brought back to the office not by the accused but by police constable Vasudev. This is to be found in para 5 page 42 of the paper book. Thus, he is able to establish his movement only upto 11.45 AM. From that moment till 1.00 P.M. there is a huge gap left.

8. The controversy, therefore, would necessarily be centering around the whereabouts of accused-appellant between 11.45 AM and 1.00 P.M. This crucial period of one hour and 15 minutes has to be critically examined on the basis of the material produced before us. At about the time of the incident, schools were closed and therefore, the deceased and the children in the neighbourhood, were in the habit of playing which included a game of cricket as well. At the house of the deceased, usually articles for the game like bat, stump

etc. were being kept and for obtaining that, according to some of the prosecution witnesses, boys had gone to the house of the deceased between 10.30 AM and 11.00 AM. These witnesses are: p.w.1 and p.w.2 Exhs.14 & 15 resp. About the time, at which they went to the house of the deceased, they are quite forthright, but about the rest of the testimony, these two witnesses are very reluctant. The remaining part related to the time at which the playing articles were brought to the house of the deceased for being returned as well as with regard to the presence or absence of two unknown persons at the house of the deceased on either of these 2 occasions. Reference to these two strangers, according to the prosecution case, was that they were original accused nos.2 & 3. One of them, p.w.1 Exh.14 Ashok Manilal, during the cross-examination by the Public Prosecutor, has admitted his previous statement given to the police in this regard and thereby, the prosecution has been able to bring on record, the remaining part. However, as stated above, the trial Court has disbelieved it.

9. Coming back to the case, according to the accused appellant, it is clear that by about 10.00 or 10.30, the deceased was very much alive. About the presence of the accused at the place of the incident between 12.00 and 12.30 p.m. the prosecution is heavily relying on p.w.5 Exh.21, Nandlal @ Lalo Tiwari. He is a witness, aged about 18 years, and was at his house in the neighbourhood as he had lost his job in a private establishment known as "Vagheswari Club". After taking his noon meal, he went out for eating tobacco known as "masala". For this purpose, he had gone to a shop just near the place of the incident and while going he saw a person standing under a neem tree near the house of Ilvina and her husband. As the witness was sitting at the shop, a young girl came running and said that "Pappu" has been murdered. He went to the place and saw father of the deceased i.e. accused-appellant coming out. According to the witness, the accused-appellant had come about 12-00 noon or even little earlier by 11.45 AM.

10. With reference to the stranger, the witness identifies him as accused no.2.

11. Coming back to the case against the accused-appellant, according to the testimony of this p.w.5, accused appellant was present earlier than the time that the accused-appellant is prepared to admit. However, so far as this witness is concerned, there is considerable confusion about the chronology of event, as also the time. The police could not have come unless

they were informed. The police came after 1.14 p.m. and therefore, if the testimony of this witness is to be taken at its face value, it would mean that when he went there on hearing about the incident, and if the police were also there, presence of the appellant at the scene of offence is meaningless, because at his instance only police had come. The witness has put everything together and the impression created by his testimony is that, when he went to the scene of offence, he found police there and so was the accused-appellant almost weeping. This would not tally with the time of 12-noon or little earlier because the police had come admittedly after 1.14 p.m.

12. Mother of deceased, Ilvina has been examined as p.w.11 Exh.29. She was admittedly away at the training centre and therefore, her testimony relating to the events after her arrival on the scene of offence is of little relevance for immediate purpose. However, she does give useful background supporting the prosecution case that the accused-appellant was hostile towards the deceased and was constantly harassing him. It is in the cross examination of this witness, that the defence has tried to bring on record that the accused-appellant had nominated the deceased in the provident found account, gratuity, retirement benefits etc. In our opinion, this is neither here nor there.

13. In the aforesaid background, L.A. Mr.Shethna very strongly urged that what remains in the field is the result of Polygraph Test and the socalled confessional statement of the accused-appellant. Polygraph Test we are not going to rely upon for the simple reason that the Forensic Science Laboratory (FSL) Officer, Mr.Vasantbhai Hathibhai(p.w.14, exh.40 page 134 onwards) who conducted the test, though has narrated everything, with regard to the method to be followed for carrying out the test, and has further confirmed that in the instant case, he did follow the method. With regard to the results obtained and the interpretation put by him as to the result thus obtained and the scientific basis for the interpretation thus put by the expert he is totally silent in his deposition. What is, therefore, left behind is merely the record of the test taken by him following a particular method recording certain results. In absence of any basis for the opinion thus formed, it ceases to be an opinion of an expert and therefore, in a criminal trial it will be useless. At this juncture, we place on record our appreciation for considerable efforts put in by both the sides with regard to the polygraph test, which being a first case of its nature, it was thought by

every one of us that we should go in detail and if necessary to decide whether Courts of law in the State of Gujarat should accept this as an evidence or not. L.A. Mr.Shethna has tried to bring as much material as he could and likewise, Mr.Y.F.Mehta, ld.APP even took recourse to internet material available through the latest electronic technology of computer and its connectivity with the information highway. The material has been retained by us, but when the very basis for considering the opinion, is not found on record, we have decided not to enter into this field and reserve it for appropriate occasion.

14. Much has to be said and was said before us about the desirability of a formal regulations before the polygraph test is taken to ensure its impartiality and credit worthiness. In this background, reference was made to Sec.164 of Criminal Procedure Code requiring a judicial magistrate to take certain precautions before recording confession of an accused, as also to the instructions issued by the High Court from time to time and Regulations framed for the purpose under Criminal Manual. We agree with learned Advocate appearing for the defence that the polygraph test must be taken under appropriate guidelines. However, as the report is not accepted by us for the aforesaid reason, and therefore not being acted upon, this line of inquiry is also not entered into by us. Inspite of this finding in favour of the defence, the statement exh.71 followed by questionnaire Exh.73 is of great importance.The incident is of 20-5-1992 and the statement is dated 30th May 1992.

15. At this juncture, we may refer to contents of Exh.71 as well as Exh.73. After giving his name and address in Exh.71, the accused declares that his admission is free of any pressure and is entirely of his own volition dictated by his conscience. Then he says that his Son Chetan has been murdered on 20-5-1992, plan for that was hatched by him and Bablo Dada (Accused no.2) on 8-5-1992 and according to that plan, his murder was done. Then he states that Bablo is known as Dada and he is staying in Nagwal Marwadi Dehla in Gheekantha area. His father's name is Bachhubhai and he used to visit office of the accused as externment case against that Bablo was going on. That is how, he came to know the accused-appellant and started visiting the accused-appellant. He, therefore, came to know wife of the accused as well as the deceased, and they have developed close contact. Bablo came to know, as a result, about frequent quarrels between the accused and

his wife and about a month and half back, while sitting under a tree, Bablo suggested that son of the accused be done away with and that will remove the bone of contention between them, to which the accused replied that he would think over it and tell him. On 8-5-1992 at about 12.15 p.m. plan to kill was prepared by some of the accused. Bablo told the accused-appellant that if the Son is done away with, there will be no descendant and there will be no enmity left either. On 20-5-1992 (the day of the incident) at about 10.00 AM said Bablo met the accused near his office and he detailed out the plan for murder of Chetan. The statement further proceeds to note that the accused-appellant was informed that Son Chetan is at home and wife of the accused-appellant has gone on service. Jewellery and other things are lying in the cupboard which is open. Thereafter, the accused-appellant went to his office and left it by about 12.00 noon for being delivered to Court No.2 and Court No.10 of Magistrate Court and Mirzapur Court which he did and reached his home by 1.00 p.m. He entered home and immediately came out and started shouting that his son has been murdered and they have been robbed by some one, as a result, people collected and the accused informed the police from mental hospital. Then he confirms that this true fact as to the offence is written in his own handwriting, in presence of Witness Mr.Patel, Exh.40. No doubt, Mr.Patel is not referred to by his name in the said statement. There is a postscript to this statement appearing at page 221 of the paper book, where he says that on further remembering the fact, he writes that on 20-5-1992 at about 10.00 AM Bablo had come with his two friends at the office of the accused and in their presence, the talk took place that as agreed, Chetan is to be murdered right now. Thus, he stated that he remembered this fact later and without any pressure, he is writing it.

16. The first part of the statement and the second part also bear endorsement of Shri V.H.Patel, said expert Exh.40 and needless to say, it has been so identified and proved by him.

17. Coming to Exh.73, 2nd question is pointedly asked as to whether the accused would reply about the murder of his Son Chetan. Third question is, whether statement given in writing in presence of the witness Mr.Patel (Exh.71) is true? Again, at question no.8, it has been repeated, whether the said admission contains true facts, as written in it. Lastly, it is asked "on 20-5-1992 at 10.00 AM after Bablo and his two friends had met the accused, whether they had gone to murder Chetan,

according to their plan?"

18. It is not even remotely suggested by the defence that Shri Patel was prompted to ask this question by the police. If at all the theory putforth by the defence that statement exh.71 is the result of the efforts made by the police, then Mr.Patel will have to be held to be an accomplice of the police, which, in our opinion, is unthinkable in the present case and luckily, it is not even suggested.

19. It may be recalled here that on accused-appellant informing the police, the police came on the scene, and it was the accused appellant, who had given the complaint. The investigation started on the basis of the information thus given by the accused-appellant himself. The police had reason to suspect him because soon thereafter, on dog squad being called, and dog Silky put to track in the first attempt itself it went to the accused-appellant pointing him to be the suspect. Yet, the interrogation seems to have started from 26-5-1992 and the first lie detector test came to be administered to him on that day. Again, on the next day, he was subjected to the test and finally on 30th May 1992, under Exh.70, he was sent once more to the Laboratory for the purpose. It was on the last occasion that the accused-appellant had broken down into tears and had insisted before the said Officer Mr.Vasantbhai Patel, Exh.40, that he wants to confess everything. Mr.Patel gave him a pen and a paper and asked him to write down whatever he wanted to and that is how, according to the prosecution, Exh.71 came into existence.

20. The first controversy with regard to this statement having been recorded by an unauthorised official of the State, would, therefore, immediately go away. Mr.Patel has not recorded the statement at all. He, on the contrary, on learning from the accused-appellant that the accused wants to confess, had merely facilitated the task by supplying him a pen and a paper. At the most, therefore, Mr.Patel is a witness of the fact of statement thus having been written down by the accused-appellant himself.

21. The authorities on the point relied upon by the defence are as under:

21.1 AIR 1956 217 (Aher Raja Khima vs. State of Saurashtra). This case relates to statement recorded under Sec.164 Cr.P.C. It must be voluntary and if on facts, it is found that the statement is given, under the

circumstances, where fear was still operating, it is obvious that it is given to gain advantage or to avoid any evil of temporal nature. As mentioned above, this being not the position here, the authority does not apply.

21.2 AIR 1957 381(Ramchandra and ano. vs. State of Uttarpradesh). This decision is on the point that conviction on confession without any other material would not be prudent. Again, this authority would not apply here. On the same line at page 637, in that very volume,in the case of Sarwan Singh Rattan Singh vs. State of Punjab, there is another decision to the effect that there could be conviction but usually corroboration must be insisted upon. The statement must be voluntary and true, but it would be a question of fact. We wholeheartedly agree with this proposition and find that, in the instant case, Exh.71, in our opinion, is voluntary and true.

21.3 AIR 1964 SC 358(State of Uttar Pradesh vs. Singhhaa Singh.. In this decision, confession was recorded by a Magistrate,who was not empowered to do so. Oral evidence to prove it was held not admissible. This authority is not applicable here because, the statement was held out to be a statement under Sec.164 of Cr.P.C. Its requirement not having been fulfilled, no amount of oral testimony could have cured the defect. This is not the position here. Hence the authority does not apply.

21.4 AIR 1978 SC 1574(Chandran vs. The State of Madras). In this case, it has been laid down that non compliance of requirement of Sec.164 would make confessional statement inadmissible. Again, this is not the position here.

22. Another strong point urged by L.A. Mr.Shethna was that right from 26th May 1993, the accused has been interrogated by the police, though he is shown to have been arrested only on 31st May 1992 and because of constant interrogation for the purpose, the accused should be considered to be in police custody and therefore, statement Exh.71 is hit by Sec.25 of the Indian Evidence Act. Further, it is submitted that, creating a situation of statement having been recorded by or before an FSL Officer, is merely a device to get out of the rigor of Sec.25 of Indian Evidence Act and other relevant provisions of law. It is also submitted on behalf of the defence that in his statement under Sec.313, in answer to question No.110 at page 46 of the

paper book, the accused stated that Exh.71 was obtained from him by police forcibly after torturing the accused.

23. If this statement was got prepared by the police as suggested by the defence, the least that could be expected is that the statement would contain clear-cut admission as to the part played by the accused in the incident. This is totally absent as one reads Exh.71. Once it is found to be in the handwriting of the accused-appellant and witness said FSL Expert Mr.Patel has stated at Exh.40 that it is the accused who had written it down in his office i.e. office of the witness, the efforts made on behalf of the defence to discredit the statement, in our opinion, fail.

24. The theory of the accused-appellant being in police custody, if not directly atleast indirectly, as putforth by Mr.Shethna, in our opinion, also cannot be accepted. He was under interrogation, about that there is no dispute. Again, looking to the contents of Exh.71, when it is totally silent about the main incident, it is not possible to believe that on account of socalled indirect custody, on account of constant pressure being brought on the accused appellant and on account of mental and physical torture that Exh.71 was brought about. On the contrary, it seems to be a clumsy attempt on the part of the accused-appellant, while accepting his involvement in the incident, he is silent about the actual part played and thereby seems to have tried to save himself.

25. In our opinion, therefore, Exh.71 has to be accepted as a confession statement made by accused-appellant on his own, in presence of witness Mr.Patel, Exh.40. It clearly refers to the murder of Chetan @ Pappu which took place on 20th May 1992 and the accused further accepts that for this a plan was prepared on 8th May 1992. For the plan, he involves accused no.2, but with regard to murder itself, he does not refer to any one, nor does he refer to his own involvement and merely states that, according to the plan worked out on 8-5-1992, murder was carried out. In our opinion, under the circumstances, there could not be a clearer admission than this.

26. The learned Sessions Judge, in his elaborate judgment, has discussed all the aspects of the matter and various submissions made before him and finally at page 333 of the paper book, in the course of his judgment, has summarised as many as 14 different circumstances against the accused-appellant. They, briefly stated, are as under:

(1) During the period that the accused would be on duty, though it was not a recess time, the accused was found at his residence, which is the place of the incident.

(2) His presence, at the place, after leaving it at 9.00 AM and before 12.30 P.M. fully knowing that only his Son Chetan is at home and his wife is not there, the accused is not able to satisfactorily explain it.

(3) Information given by the accused at 1.14 p.m. would therefore, be a circumstance against him inview of the earlier two circumstances narrated above.

(4) To mislead the police, he became a complainant and gave the complaint.

(5) Police Dog, Silky, while tracking in the house itself had pointed out the accused and thereafter, according to the prosecution, he was pointed out by that Dog outside the house in presence of the members of the public.

(6) Outside the house also, after smelling the articles the dog went straight to the accused-appellant.

(7) There were blood stains on the shirt of accused which on analysis was found to be matching with the blood group of Chetan. Needless to say, the blood found on the muddamal article shirt was of human origin.

(8) Relation of the accused-appellant with his wife and with his deceased Son Chetan were not cordial.

(9) Confessional statement written down by the accused-appellant at the Laboratory i.e. Exh.71.

(10) At the place of the incident, it was the accused, who was with the accused.

(11) Though between the aforesaid interval, he was not on duty, the accused claimed to be on duty.

(12) The deceased was done to death in a very cruel manner, his genital was cut and placed by the

side and coupled with that, show of loot having been carried out was made, which show could not last very long because very soon, the articles themselves were recovered leaving only the unexplained part of death of Chetan. Theory of death having been caused in the process of loot therefore, had become totally inconsistent.

(13) As noted above, many of the articles were recovered from the house itself.

(14) Exh.71 contains admission of guilt.

27. There are some authorities cited at the bar on behalf of the accused-appellant, left to be discussed. We will now be referring to them.

28.1 AIR 1956 SC 51(Prabhu Babaji Navle vs. State of Bombay) Head Note: A: It is with regard to Sec.34 of Indian Penal Code. Accused and 4 others were named in the complaint, 4 out of them came to be acquitted. This naturally took away element of common intention and therefore, there could not be any conviction with the help of Sec.34. In that case, however, if one examines the fact, it is noticed that the accused were not charged individually for having committed murder, which is not the position in the instant case. The authority, therefore, doesnot apply.

28.2 AIR 1979 SC 1949 (PohalyaMotya Valvi vs. State of Maharashtra: It reiterates the well known principle as to circumstantial evidence. The chain must be complete and must exclude any hypothesis consistent with innocence of the accused. In that case, blood stains were found on the Dhoti of the accused. In para 18 of the judgment, Their Lordships were pleased to hold that the accused being an agriculturist, blood stains on Dhoti could not be said tobe an uncommon factor.

In the instant case, it is on the shirt, that too on the back side and the accused is a peon working in an office. Blood stains would ordinarily not be found on his wearing apparels unless he had a recent injury which he has to refer to in his explanation. He has not done so. So far as the chain of circumstance is concenred, the factors narrated above in our opinion make it complete. The authority, therefore, does not help the accused.

28.3 AIR 1990 SC 2140(KishoreChand vs. State of

Himachal Pradesh: This authority is cited on the basis that, if the accused was found to be involved in the incident, the Investigating Officer would not have left him without detention and if he suspected him,Sec.164 Cr.P.C. would have been invoked and accused would certainly be arrested. Device to circumvent Sec.25 of the Evidence Act was, therefore, suspected in that case.

In the case before us, except for the dog pointing towards the accused-appellant immediately the Investigating Officer came, there was no other material. In fact, it was the accused himself, who was the complaiant and the incident was informed by the accused at 1.14 p.m. The police had come on the scene. In the aforesaid Supreme Court decision, after the Investigating Officer leaves the place of investigation after he identifies the accused as one the last seen with the accused, the accused confessed before the I.O. Pradhan. In the instant case, we have seen that the accused has done so only on 30th May 1993 by putting everything in writing, in his own hand before an Officer of the FSL. We, therefore, do not consider it a device document to circumvent under Sec.25 of the Indian Evidence Act.

28.4 AIR 1995 SC 980(Shivappa vs. State ofKarnataka): This decision underlines the fact of the custody from whom the accused is produced for recording confession under Sec.164. The aspect of custody, in the instant case, has been gone into and therefore, in our opinion, this decision also will not be applicable.

29. Each one of the aforesaid circumstances recorded by the learned trial Court Judge, though small in nature, is quite relevant and if based on them, the learned Additional Sessions Judge has found the accused-guilty, the decision cannot be said to be wrong in any manner. We have, however, on our own, critically analysed the problem from the point of view of the time factor set out in the earlier part of the judgment and on the basis of the material that we found on record and for the reasons stated above, we come to the conclusion that the accused-appellant has been rightly convicted. The appeal, so far as the accused-appellant is concerned, is therefore, dismissed.

30. So far as the State Appeal for enhancement of the sentence awarded to accused-Rajan Jhonsonbhai Christy is concerned, AIR 1979 SC 964 (Vishnu Deo Shaw, vs. State of West Bengal) is a clear answer to this appeal. As

laid down therein, crime is not to be seen, while awarding the sentence, but the criminal is to be seen. Moreover, in cases where conviction is based on circumstantial evidence, in our opinion, it would not be safe to award death sentence. There are no other extra ordinary circumstance brought about in the case when we heard the main appeal filed by the accused himself as to lead us to accede to the request of the State for enhancing the sentence for life to that of capital punishment. The appeal, is therefore, dismissed.

31. The 2nd appeal of the State i.e. Criminal Appeal No.124 of 1994 is against the acquittal of accused no.2. Out of three accused, two accused i.e. accused nos.2 & 3 have been acquitted. Against acquittal of accused no.3, the State has not come in appeal and as such, acquittal of accused no.3 has become final. Almost same material being there with regard to accused no.2 also, we do not see any reason to interfere with the acquittal order passed by the trial Court. The appeal of the State against acquittal of accusedno.2 is, therefore, dismissed.

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